# RECENT CASES.

ATTORNEYS—DISBARMENT—NON-PROFESSIONAL MISCONDUCT—An attorney was tried and convicted of conspiring to conceal assets from a trustee in bankruptcy. *Held:* It was good ground for disbarment although the offense was not committed while exercising a function of his professional office. *In re* Gottesfeld, 245 Pa. 314 (1914).

Conviction of a crime is generally held a good ground for the disbarment of an attorney. *Ex parte* Wall, 107 U. S. 265 (1882). Some courts hold that it is enough if offense is indictable. State v. Winton, 11 Oregon 456 (1884). The crime need not be a felony, *In re* McCarthy, 51 N. W. Rep. 963 (Mich. 1879); *In re* Madigan, 66 Minn. 9 (1896); but is enough if it is a misdemeanor involving moral turpitude. *In re* Kirby, 84 Fed. Rep. 606 (1898); *In re* Wellcome, 23 Mont. 140 (1899).

As good character is an essential qualification for the admission of an attorney to practice, he may be removed whenever he ceases to possess such a character. And so it has been generally held that an attorney may be disbarred for such misconduct unconnected with his professional duties as shows him to be an unfit and unsafe person to manage the legal business of others. *In re* Heyman, 140 N. Y. S. 1065 (1913); Delano's Case, 58 N. H. 5 (1876); *In re* Wellcome, 58 Pac. Rep. 45 (Mont. 1899); *Ex parte* Wall, 107 U. S. 265 (1882). The lending of money usuriously was held not to constitute a cause for disbarment, People v. Wheeler, 259 Ill. 99 (1913); likewise, drawing cheque when he has no funds, not done in connection with his profession. *In re* Stryker, 1 Wheeler Cr. Cas. 330 (N. Y. 1816). The principal case is in accord with *Ex parte* Steinman, 95 Pa. 220 (1880), sometimes cited as *contra* to general rule above stated, but which really only narrows it slightly in that State.

CARRIERS—ACT OF GOD—PROXIMATE CAUSE—A carrier received a consignment of fruit on the evening of February 15. During that night a snowstorm came up and the weather turned severely cold. On February 16, the carrier company operated passenger trains only. On February 17, a day more severe than the former, the shipment was delivered in a damaged condition. *Held:* The carrier is liable for damages, as it was the result of negligence on the part of the carrier co-operating with the act of God. St. Louis & S. & F. Ry. Co. v. Dreyfus, 141 Pac. Rep. 773 (Okl. 1914).

An act of God is an inevitable accident which cannot be prevented by man: Sonneborn v. Southern Ry. Co., 65 S. C. 502 (1902). The act of God, to exempt a carrier from liability, must be the proximate and not the remote cause of loss: Michaels v. N. Y. Central Ry. Co., 30 N. Y. 564 (1864). Not only this, but it must be the sole cause: M. K. & T. Ry. Co. v. Johnson, 34 Okl. 582 (1912).

This case is in accord with the general rule, that if the negligence of a carrier co-operates with the act of God, the carrier is liable: Grier v. St. Louis Merchants Bridge Terminal Ry. Co., 108 Mo. App. 565 (1904); C. R. I. & P. Ry. Co. v. McKowe, 36 Okl. 41 (1912). Precautionary measures are also required to be used by a carrier, when notified by the Government Weather Bureau of unusual weather, to exempt it from liability: Wabash R. Co. v. Sharpe, 107 N. W. Rep. 758 (Neb. 1906).

CARRIERS—PASSENGERS—PASS—The plaintiff was injured while riding on a pass. At the time of employment, transportation was promised as part consideration for services, but when applied for, the applicant was required to sign an agreement exempting carrier from liability. *Held:* The plaintiff was a gratuitous passenger and the carrier exempt from liability. Hageman v. Puget Sound Electric Ry., 141 Pac. Rep. 1027 (Wash. 1914).

"The obligation of a carrier as to the care required for the safety of passengers is the same to a passenger riding on a free pass as to those who pay fare, in the absence of a special agreement." *In re* Cal. Nav. & Imp. Co., 110 Fed. Rep. 670 (Cal. 1901). The decisions are not in harmony as to the effect given to a provision in a free pass exempting the carrier from liability for injuries caused by its negligence, Harris v. Puget Sound, 52 Wash. 289 (1909); one view holding the exemption clause invalid as contrary to public policy, G. C. & F. Ry. Co. v. McGown, 65 Texas 640 (1886); Jacobus v. St. Paul Ry. Co., 20 Minn. 125 (1873); Mobile & O. R. Co. v. Hopkins, 41 Ala. 486 (1869); the other view in accord with the principal case holding the exemption clause valid, the pass being a mere gratuity, Northern Pac. Ry. Co. v. Adams, 192 U. S. 440 (1904); Boering v. Chesapeake Ry. Co., 193 U. S. 442 (1904).

If the pass is issued to the employees as a gratuity, the clause providing the holder assumes all risks exempts carrier from liability. Dugan v. Blue Hill Street Ry. Co., 193 Mass. 431 (1907). But where a pass constitutes a portion of the consideration for service, liability of carrier exists. Peterson v. Seattle Traction Co., 23 Wash. 615 (1900).

CHARITABLE INSTITUTIONS—LIABILITY FOR TORTS—A physician in a hospital operated on one of the patients contrary to her wish. *Held:* The hospital, being a charitable institution, is not liable for the torts of its servants toward patients. Schloendorff v. N. Y. Hospital, 105 N. E. Rep. 92 (N. Y. 1914).

This case is in accord with the general rule that a charitable institution is not liable for injuries to its inmates due to the negligence of its employees, where it has exercised due care in their selection. Corbett v. St. Vincent's School, 177 N. Y. 16 (1903); Hearns v. Waterbury Hospital, 33 Atl. Rep. 595 (Conn. 1895). Different reasons have been given for exempting charities from liability. In a few jurisdictions where the immunity of charities from liability for torts has been carried farthest and is practically absolute, the theory advanced is, that the corporation being the subject of a charitable trust, to suffer a judgment to be recovered against it would be an illegal diversion of trust estate. Fire Ins. Patrol v. Boyd, 120 Pa. 624 (1888). The decision has also been based on the theory that the beneficiary of a charitable trust enters into a contract whereby he assumes the risk of such torts. Bruce v. Church, 147 Mich. 230 (1907); and, in the principal case, it was based upon the theory that the relation between a hospital and its physicians is not that of master and servant, but that the hospital, instead of undertaking to act through the physicians, merely procures them to act on their own responsibility. Consistently with the general rule it is held that a charity is liable for the torts of its employees to strangers, they not being recipients of its benefits. Hordern v. Salvation Army, 32 L. R. A. 62 (N. Y. 1910); injury to a mechanic employed by charity, Bruce v. Church, *supra*. Only a few jurisdictions deny any degree of immunity to charities. Glavin v. R. I. Hospital, 12 R. I. 411 (1878).

CONFLICT OF LAWS—CONTRACTS—WHAT LAW GOVERNS—A retail liquor dealer of Texas bought liquors and wines from a wholesale firm of Ohio, and subsequently moved to Oklahoma. The purchase and sale of liquor were legal in both Texas and Ohio, but contrary to statute in Oklahoma. Suit was brought against the retail dealer in the courts of Oklahoma to recover the contract price of the wines and liquors shipped to him by the wholesale firm while he was in Texas. *Held:* This contract comes under the general rule that contracts valid where made are valid everywhere. The contract in question was made either in Ohio or Texas, and is valid in either State. Recovery allowed. Klein v. Keller, 141 Pac. Rep. 1117 (Okla. 1914).

The question of the legality of a contract is determined by the law of the State or country in which the contract was made. Scudder v. Union Natl. Bank, 91 U. S. 406 (1875); Midland Co. v. Broat, 50 Minn. 562 (1892). When performance is to take place in a State other than that in which the

contract was made, its validity is governed by the law of the State in which it is to be performed. National Mutual Building Assn. v. Ashworth, 91 Va. 706 (1895). This rule, however, is departed from in some cases. Brown v. American Finance Co., 31 Fed. Rep. 516 (U. S. 1887).

Even though the contract meets all requirements of the *lex loci contractus,* another State or country may refuse to enforce it because contrary to good morals. Levy v. Kentucky Distilling Co., 9 Ky. L. Rep. 103 (1887); injurious to the State or its citizens. Faulkner v. Hyman, 142 Mass. 53 (1886); in fraud or violation of the laws of the State. Fisher v. Lord, 63 N. H. 514 (1885); Swing v. Munson, 191 Pa. 582 (1899); contrary to public policy. Rousillon v. Rousillon, 14 Ch. D. 351 (Eng. 1880). It was upon this point that the principal case turned, whether or not the contract in question was contrary to the laws and policies of the State of Oklahoma. Inasmuch as both parties were engaged in business recognized as lawful in the States where they were at the time the contract was entered into and performed, and since there was involved no question of public morals or injury to the State, the court applied the general rule and held the validity of the contract to be governed by the *lex loci contractus.*

CONTRACTS—CONSIDERATION—SUFFICIENCY—Shortly before a child's birth, the defendant's testator promised the father that if the child should be named after him he would make some provision for it. After the child's birth, the testator signed an instrument agreeing to place a sum in trust for the child. *Held:* The privilege of naming a child is valid consideration for a promise to pay money. Gardner v. Denison, 105 N. E. Rep. 359 (Mass. 1914).

This case is in line with the other cases on the subject. Changing a child's Christian name has been held sufficient consideration to support a promise by the person at whose request the name was changed to leave the child a certain sum, Babcock v. Chase, 92 Hun, 264 (N. Y. 1895); or to convey land to the child, Daily v. Minnick, 91 N. W. Rep. 913 (Ia. 1902). The child cannot be said to have no interest in the name imposed. The consequences affect him more than anyone else. He is deprived of the advantage of having any other name and subjected to the possibility of detriment on account of the name he bears. Eaton v. Libbey, 42 N. E. Rep. 1127 (Mass. 1896). Assuming that the privilege belongs to the parents, if they waive their rights in favor of another, the child has an interest in the name it shall bear analogous to the interest it has in its own services which belong to the father, but which, if the father waives his right, furnish good consideration for a promissory note given to the child by one to whom the services have been rendered. Eaton v. Libbey, *supra;* Nightingale v. Withington, 15 Mass. 272 (1818).

These cases illustrate the principle that anything done by the promisee, entailing any loss or inconvenience even of the most trifling description, if not utterly worthless in fact and in law, constitutes a sufficient consideration for a promise, Clarke v. Sigourney, 17 Conn. 311 (1846), and that when a party gets all he contracted for he cannot say that he gets no consideration or that it has failed, Wolford v. Powers, 85 Ind. 294 (1882). The parties themselves are the just measurers of the value of that which they give. Pollock, Principles of Contract, p. 184, par. 2 (Ed. 1911); Sturlyn v. Albany, 1 Cro. Eliz. 67 (1587); Bainbridge v. Firinstone, 8 A. & E. 743 (Eng. 1838); Brooks v. Haigh, 10 A. & E. 309, 323, 334 (Eng. 1839); Wilkinson v. Oliveira, 1 Bing. N. C. 490 (1835). And as one is free to make or refuse a contract, he is bound by it when made. Train v. Gold, 5 Pick. 380 (Mass. 1827); Hempler v. Schneider, 17 Mo. 258 (1852); Cowee v. Cornell, 75 N. Y. 91 (1878); Lindell v. Rokes, 60 Mo. 249 (1875).

CONTRACTS—CONSPIRACY—BOYCOTT—A labor union sought to enjoin an agreement between a rival union and an employer which provided that all persons employed should be members of the defendant union whenever such

men were available. *Held:* The incitements to the contract being those of business advantage alone, and there being no intent to injure the plaintiff, the bill must be dismissed. Hoban v. Dempsey, 104 N. E. Rep. 711 (Mass. 1914).

In general, it is a tort to place pressure more than argument on an individual in order to dissuade him from dealing with a third person. Casey v. Cincinnati Typo. Union, 45 Fed. Rep. 135 (1891); Brennan v. United Hatters of N. A., 73 N. J. L. 729 (1907); Prickett v. Walsh, 192 Mass. 572 (1906). There is a clear distinction between acts which have their inducement in malice or ill-will, and those which have their inducement in business competition and rivalry. Mogul Steamship Co. v. McGregor, 23 Q. B. D. 598 (Eng. 1899); Continental Ins. Co. v. Board of Fire Underwriters, 67 Fed. Rep. 310 (1895); Jacobs v. Cohen, 183 N. Y. 207 (1905). It is on this ground that the court distinguishes the principal case from De Minico v. Craig, 207 Mass. 593 (1910), and Hanson v. Innis, 211 Mass. 301 (1912), where the result of the contract between the plaintiff's employer and the defendant was that the plaintiff was discharged. There was nothing of the boycott about this contract, for the essence of the boycott is intentional injury. State v. Stockford, 107 Am. St. Rep. 28 (Conn. 1904); Doremus v. Henning, 176 Ill. 608 (1899); Eitz v. Minn. Produce Ex., 79 Minn. 140 (1900). Nor was there economic pressure, threats of business loss or interference with absolute freedom of action. A voluntary and unenforced agreement, made solely for the material advantage of the contracting parties, is valid. National Fireproofing Co. v. Mason Builders Ass'n, 169 Fed. Rep. 259 (1909); Martell v. White, 185 Mass. 255 (1905); Kissan v. U. S. Printing Co., 199 N. Y. 76 (1910).

CONTRACTS—MEETING OF THE MINDS—An undisclosed agent made a contract with defendant for certain paving blocks. The blocks were unmerchantable and plaintiff, as an undisclosed principal, sued for damages. *Held:* This was a valid contract, as the very parties intended to be bound were bound, the necessary parties were present and there was a meeting of the minds. Kelly Asphalt Block Co. v. Barber Asphalt Paving Co., 105 N. E. Rep. 88 (N. Y. 1914).

It is well settled that to form a valid contract there must be a meeting of two minds, Ross v. Savage, 63 So. Rep. 148 (Fla. 1913), at the same time and on the same terms. Sutter v. Raeder, 50 S. W. Rep. 813 (Mo. 1899); Creecy v. Grief, 61 S. E. Rep. 769 (Va. 1908); Seurs & Co. v. Arms Co., 178 Ill. App. 318 (1913). A contract must result from the concurrence of the minds of both parties, it is not dependent on the understanding of one of them. Mfg. Co. v. Assurance Co., 76 S. E. Rep. 865 (N. C. 1913). No action will lie for an order of goods obtained by the false and fraudulent representations of the plaintiff that he was the authorized agent of a certain manufacturer, Fox v. Gabel, 66 Conn. 397 (1895), nor if the plaintiff falsely represented himself as the agent of an undisclosed principal, Rodliff v. Dullinger, 141 Mass. 1 (1886). Every one has a right to select and determine with whom he will contract and cannot have another person thrust upon him without his consent. Smelting Co. v. Mining Co., 127 U. S. 387 (1887). Though a contract resting in parol must be assented to by both parties in the same sense, Martin v. Thrower, 3 Ga. App. 784 (1908), yet it is not necessary that the minds of both meet on express words clearly expressed. Zitske v. Grohn, 128 Wis. 159 (1906). If parties have failed to reach an agreement as to all the conditions, there is no contract, though both parties supposed there was. Sheldon v. Crane, 125 N. W. Rep. 238 (Iowa, 1909). A party to a written contract is bound thereby, in absence of fraud, *et cetera.* And he may not assert he did not intend to agree to the contract. Weil v. Mfg. Co., 80 Atl. Rep. 447 (R. I. 1911).

The burden is on him who sues for breach of contract to prove the meeting of the minds. Swing v. Walker, 27 Pa. Super. Ct. 366 (1905). This can be done by the contract itself where the language is plain and unambigu-

ous. Ellicott Co. v. U. S., 44 Ct. Cl. 127 (U. S. Ct. Cl. 1909). It is for the jury to say whether a contract existed where all negotiations were oral and evidence is conflicting, Woolman v. Ice Co., 18 Pa. Super. Ct. 596 (1902), or if negotiations consist of letters and conversations, Transmission Co. v. Crane Co., 70 N. E. Rep. 319 (Ill. 1904); Rogers v. Fenimore, 41 Atl. Rep. 886 (Del. Super. 1898); but it is for the court where transaction consists of letters and telegrams. Service Co. v. Drug Co., 128 S. W. Rep. 7 (Mo. App. 1910).

CONTRACTS—MORAL OBLIGATION—One under contract to dig ditches and lay pipe for Philadelphia's filtration system was required to do work clearly outside of his contract. This was done by direction of the engineer of the department with the expectation on the part of both him and the contractor that it would be paid for as additional work. The councils directed such payment and the Mayor approved the ordinance. *Held:* There was a moral obligation on the part of the city to pay the plaintiff's claim and this became a legal obligation when its payment was assumed and directed in the manner provided by law. The plaintiff is entitled to the amount of the claim and also compensation for its unjustifiable detention. Cunningham v. Phila., 245 Pa. 181 (1914).

A contractor who had engaged to construct a sewer for the city for a fixed price preferred to do the work in a way different and more expensive than that provided in his contract. The city would pay only the fixed contract price. The contractor sued for the cost of his extra work, and was non-suited. Councils later passed an ordinance making an appropriation for payment of the contractor's claim, a referee having found that this amount was morally due. A taxpayer's bill was filed to restrain payment, on the ground that the city was under no moral obligation to make it, and that the ordinance was invalid. The lower court granted the relief prayed for, and this decree was affirmed. Longstreth v. Phila., 245 Pa. 233 (1914).

The general rule prevailing in the large majority of jurisdictions is that mere moral obligation does not constitute consideration. Thompson v. Thompson, 78 N. Y. Supp. 389 (1902); Davis v. Anderson, 99 Va. 620 (1901). To support a subsequent promise there must have been some pre-existing legal obligation which at one time constituted a good and valuable consideration. Hendricks v. Robinson, 56 Miss. 694 (1879); Sternbergh v. Provoost, 13 Barb. 365 (N. Y. 1851). A few States, however, still cling to the early English rule laid down by Lord Mansfield in the case of Atkins v. Hill, 1 Cowp. 284 (Eng. 1775), which upheld moral obligation alone as good consideration for a subsequent express promise. Among these States are Pennsylvania and Maryland. Bentley v. Lamb, 112 Pa. 480 (1886); Robinson v. Hurst, 78 Md. 59 (1893).

That the courts of Pennsylvania will enforce a promise made in view of a moral obligation is clearly shown in the two principal cases *supra*. The difference between the results reached is due not to any doubt as to this proposition but to the difference in facts. In the first case, Cunningham v. Phila., the facts were held sufficient to set up a moral obligation on the part of the city to pay, while in the latter, Longstreth v. Phila., the court found that the city was at no time under any obligation, even moral.

CONTRACTS—THIRD PARTY'S RIGHTS—A subcontractor sued the principal contractor, declaring upon the contractor's bond, conditioned for the performance of the building contract and for the payment of all claims for labor and material furnished. *Held:* The subcontractor cannot recover, since there was no existing liability on the part of the owner, the obligee in the bond, to him at the time of the execution of the bond. Cleveland Metal, *etc.*, Co. v. Gaspard, 106 N. E. Rep. 9 (Ohio, 1914).

The cases upon this question are decidedly in conflict. The principal case is in accord with the New York doctrine that a third party can sue on a contract made for his benefit only when the promisee was under some existing obligation toward him at the time the contract was made. Lawrence

v. Fox, 20 N. Y. 268 (1859); Jefferson v. Asch, 25 L. R. A. 257 (Minn. 1894); La Crosse Lumber Co. v. Schwartz, 147 S. W. Rep. 501 (Mo. 1912). However, some of the jurisdictions which follow this rule hold that a moral obligation is sufficient. Buchanan v. Tilden, 158 N. Y. 109 (1899); Sample v. Hale, 34 Neb. 220 (1892). In a few jurisdictions, the third person can sue only when there was no such pre-existing obligation. National Bank v. Grand Lodge, 98 U. S. 123 (1878). The prevailing American rule, subject to various limitations in the several jurisdictions, is that the third party can always sue, regardless of whether or not there was a pre-existing obligation. Ochs v. Carnahan Co., 80 N. E. Rep. 163 (Ind. 1907); Zwietusch v. Becker, 140 N. W. Rep. 1056 (Wis. 1913); Olson v. Ostby, 178 Ill. App. 165 (1913). For cases and a thorough discussion of the entire subject, see Note to Jefferson v. Asch, *supra*, and 15 H. L. R. 804.

In Pennsylvania, there must be some transfer of property from promisee to promisor to allow the third person to sue. Adams v. Kuehn, 119 Pa. 76 (1888); Hostetter v. Hollinger, 117 Pa. 606 (1888). In a few jurisdictions, the third party cannot sue in any case. Tweedle v. Atkinson, 1 B. & S. 393 (Eng. 1861); Mellen v. Whipple, 1 Gray, 317 (Mass. 1854); Maccabees v. Sharp, 128 N. W. Rep. 786 (Mich. 1910). Massachusetts and Michigan recognize a few exceptions. A mere incidental beneficiary can never sue on a contract to which he is not a party. Durnherr v. Rau, 135 N. Y. 219 (1892); Uhrich v. Globe Surety Co., 166 S. W. Rep. 845 (Mo. 1914). In the majority of jurisdictions, beneficiaries cannot sue upon contracts under seal. Willard v. Wood, 135 U. S. 309 (1890); De Bolle v. Penna. Ins. Co., 4 Whart. 68 (Pa. 1838); Emmitt v. Brophy, 42 Ohio St. 83 (1884) *contra*. Either by statute or decision, the beneficiary of an insurance policy can sue upon it in every jurisdiction. Blinn v. Dame, 207 Mass. 159 (1911); Motley v. Manufacturers' Ins. Co., 29 Me. 337 (1849). Likewise, except in England, a mortgagee can sue the grantee of land who has assumed the mortgage. 15 H. L. R. 808.

CORPORATIONS—SIMILARITY OF NAMES—Mandamus proceedings were brought to compel the Secretary of State to issue a license to the "Kennewick Fruit Exchange." By statute no corporation could organize under a name so similar to that of another corporation as to be misleading. There were already corporations operating in the State under the following names: "Kennewick Fruit-Land Company," "Kennewick District Fruit Growers' Association," and "Kennewick Fruit and Produce Company." *Held:* That the name of the proposed company was so similar to those existing corporations as to be misleading. State *ex rel.* Collins v. Howell, Sec. of State, 141 Pac. 1157 (Wash. 1914).

Both at common law and under the majority of the State incorporation acts, a corporation has a right to the exclusive use of its corporate name and this right will be protected even to the extent of preventing the use by another corporation of a name, not identical, but substantially the same, and therefore calculated to deceive. Phila. Trust, Safe Deposit and Ins. Co. v. Phila. Trust Co., 123 Fed. Rep. 534 (1903); People's Outfitting Co. v. People's Outlet Co., 170 Mich. 398 (1912); Corning Glass Works v. Corning Cut Glass Co., 197 N. Y. 173 (1910); Electromobile Co., Ltd., v. British Electromobile Company, Ltd., 97 L. T. Rep. 196 (Eng. 1907).

The names of the following corporations have been held to be so similar as to be misleading: "Kansas City Real Estate Exchange" and "Kansas City Real Estate and Stock Exchange," 92 Mo. 355 (1887); "National Liberty League" and "National Liberty Legion," 225 Ill. 496 (1907); "Glucose Sugar Refining Co." and "American Glucose Sugar Refining Company," 56 Atl. Rep. 861 (N. J. 1899). The following have been held sufficiently dissimilar: "The Hygeia Water Ice Co." and "The New York Hygeia Ice Co.," 140 N. Y. 94 (1894); "The Michigan Savings Bank" and "The Bank of Michigan," 162 Mich. 297 (1910); "The Elgin Butter Co." and "The Elgin Creamery Co.," 155 Ill. 127 (1895).

The Washington statute corresponds generally with the provisions of the incorporation laws of other States—N. J. Laws 1896, p. 280, c. 185; 21 Del. Laws 445, c. 273 (1899)—and with the English Companies Act, 8 Edw. 7, c. 69 (1908).

In Pennsylvania there is no such prohibitive statute. But the Secretary of State will refuse a charter to a company with a name similar to that of another corporation. It tends toward complications in the matter of levying taxes and in judicial matters. Kidd Bros. and Burgher Steel Wire Co., 17 Pa. C. C. 238 (1896).

CRIMINAL LAW—ACCOMPLICE—WHAT CONSTITUTES—The accused hired an agent and completed arrangements with him to burn a house while the witness was listening. The accused and the witness were not present when the house was burned. *Held:* The witness was not an accomplice within the rule requiring an accomplice's testimony to be corroborated. State v. Grant, 140 Pac. Rep. 959 (Idaho, 1914).

The term "accomplice" includes all those who participate in the commission of a crime, whether as principal in the first or second degree, or accessory before or after the fact, *In re* Rowe, 77 Fed. Rep. 161 (1896); People v. Coffey, 119 Pac. Rep. 901 (Cal. 1911); although a few decisions have held that an accessory after the fact is not an accomplice, State v. Umble, 115 Mo. 452 (1893). The general rule, as laid down in the principal case, is well established that an accomplice must actually co-operate in the commission of the crime. Mere knowledge that a crime is to be committed and concealment of such knowledge is not sufficient. Levering v. Commonwealth, 132 Ky. 666 (1909); State v. Roberts, 15 Ore. 187 (1887); Smith v. State, 23 Tex. App. 357 (1887). A person who participates in the moral guilt of a crime but is not connected therewith in such a way that he could be indicted for the offense, is not an accomplice. State v. Gordon, 117 N. W. Rep. 483 (Minn. 1908). An accomplice must have criminal intent, Walker v. The State, 118 Ga. 757 (1903); and must co-operate voluntarily. People v. Miller, 66 Cal. 468 (1885).

The great weight of authority is that one who joins in the commission of a crime for the purpose of exposing it, and bringing the criminals to punishment and honestly carries out that design, is not an accomplice. Commonwealth v. Hollister, 157 Pa. 13 (1893); State v. Smith, 117 Pac. Rep. 19 (Nev. 1911); *contra,* Dever v. State, 37 Tex. Crim. App. 396 (1896).

CRIMINAL LAW—FORMER JEOPARDY—SAME OFFENSE—The defendant, having been in jeopardy upon an information or affidavit that he contributed to the moral delinquency of a female person, was indicted for rape. *Held:* The defense of former jeopardy must fail. The words "same offense" mean the same offense—not the same transaction, not the same acts, not the same circumstances or the same situation. State v. Rose, 106 N. E. Rep. 50 (Ohio, 1914).

The general rule at common law seems to be that in order to make the plea of former jeopardy a good defense the two offenses must be in substance precisely the same, or at least of the same nature or species. People v. Bentley, 77 Cal. 7 (1888); Com. v. Fredericks, 155 Mass. 455 (1892). Or the one offense must be an ingredient of the other. State v. Cooper, 13 N. J. L. 361 (1833). The test seems to be that if the evidence offered to support the second indictment would have been admissible at the former trial, would have related to the same crime, and would have warranted a conviction for that crime, the offenses are identical, and the plea of former jeopardy is good. Wilson *et al.* v. State, 24 Conn. 57 (1855); Smith v. State, 85 Ind. 553 (1882); U. S. v. Nickerson, 17 How. 204; Com. v. Hiland, 1 Pa. C. C. 532 (1886).

By statute, an act may constitute more than one offense. In some jurisdictions under such circumstances an acquittal or conviction of one offense will be a bar to an indictment for the other. Dinkey v. Co., 17 Pa. 126 (1851);

Wilcox v. State, 6 Lea 571 (Tenn. 1880). Especially where one offense is an ingredient of the other. State v. Cooper, *supra*. But see *contra*, Morey v. Com., 108 Mass. 433 (1871); Berkowitz v. U. S., 93 Fed. 452 (1899).

One who is convicted of a crime less in degree than the offense for which he is indicted is by implication acquitted of the greater offense and may plead said acquittal as a bar to a subsequent indictment for it. State v. Smith, 43 Vt. 324 (1871); Com. v. Neeley, 2 Chester Co. Rep. 191 (Pa. 1884); Williams v. Com., 102 Ky. 381 (1897). The converse is also held. State v. Hattabough, 66 Ind. 223 (1879); Triplett v. Com., 84 Ky. 193 (1886).

CRIMINAL LAW—LARCENY—OWNERSHIP OF PROPERTY—The prosecutor contracted with an owner of cattle that he would collect all the cattle he found on her range and would pay her a certain price per head. One steer not discovered nor paid for by him was stolen by the defendant, who was indicted for larceny of the prosecutor's property. *Held:* The contract did not vest the property in the prosecutor and larceny of his property cannot be sustained. State v. Childers, 142 Pac. Rep. 333 (Ore. 1914).

The above case is in accord with the undisputed law that an indictment for larceny alleging the property stolen to be in one person cannot be sustained if the property is found to be in another. Young v. State, 73 Ark. 169 (1904); Pitts v. State, 22 S. W. Rep. 410 (Tex. 1893); State v. Dredden, 41 Atl. Rep. 925 (Del. 1898).

This decision also substantiates the well-settled doctrine that a contract involving the sale of non-specific goods does not vest property in the vendee until the said goods are actually specified. State v. Cotterel, 12 Idaho 572 (1906); Martin Bros. & Co. v. Lesan, 129 Ia. 573 (1906); Conrad v. Penn. R. Co., 214 Pa. 98 (1906); Kellogg v. Frohlich, 139 Mich. 612 (1905). However, title to personal property will pass from seller to buyer when the parties agree that it shall, whatever the circumstances. Levassen v. Cary, 3 Atl. 461 (Me. 1886); Wagar v. Detroit Land N. R. Co., 79 Mich. 648 (1890). Even in the case of specific goods, in the absence of a contrary intention, no title passes to the buyer on a contract of sale if the vendor is required to do anything to such property before delivering it. Blackwood v. Cutting Packing Co., 76 Cal. 212 (1888); Wollensock v. Briggs, 119 Ill. 453 (1887); Foster v. Ropes, 111 Mass. 10 (1872). But as to whether the weighing or measuring of specific goods by the seller prevents property from vesting in the vendee, there is a decided conflict of authority in America. Many States hold that if the weighing or measuring is merely for the purpose of ascertaining the price, title passes to the vendee. Farmers' Phosphate Co. v. Gill, 69 Md. 537 (1888); Sanger v. Waterbury, 116 N. Y. 371 (1889); Nash v. Brewster, 39 Minn. 530 (1888); Bash v. Walsh, 39 Mo. 192 (1866). *Contra:* Dixon v. Meyer, 7 Gratt. 240 (Va. 1851); Hutchinson v. Grand Trunk R. R. Co., 59 N. H. 487 (1879); Burrows v. Whitaker, 71 N. Y. 291 (1877); Haug v. Gillett, 14 Kans. 140 (1875). Though the decisions are not unanimous, England still clings to the earlier view that property does not vest. Simmons v. Swift, 5 Barne &c. 857 (Eng. 1826); Hanson v. Meyer, 6 East 614 (Eng. 1805); Swanwick v. Sothern, 9 Ad. and El. 895 (Eng. 1839).

CRIMINAL LAW—SUBJECT OF LARCENY—OYSTERS—Oysters taken from their natural beds in a State oyster reserve, contrary to the provisions of a statute, are not the subject of larceny, and the statutory penalty for such taking is the only one that can be inflicted. State v. Johnson, 141 Pac. 1040 (Wash. 1914).

This decision is in accord with the well-settled principle that oysters growing naturally in the public waters of a State belong to the people of that State, who may take them in pursuance of their common right to fish, unless there are prohibitive statutes. Smith v. Maryland, 59 U. S. 71 (1855); Brown v. De Groff, 50 N. J. L. 409 (1888); Allen v. Allen, 19 R. I. 114 (1898). The State undoubtedly has the power to pass such statutes, regulating the right to take shell-fish and other fish. Corfield v. Coryell, 4 Wash. Circ. Ct. 371

(1823); *Ex parte* Fritz, 86 Miss. 210 (1905); State v. Connor, 107 N. C. 931 (1890); State v. Cozzens, 2 R. I. 561 (1850). The violation of such statutes, however, as is intimated in the principal case, is not common-law larceny; the statutory penalty alone can be imposed. Rowe v. State, 92 Ark. 155 (1909); People v. Hislop, 77 N. Y. 331 (1879); McElhiney v. Commonwealth, 22 Pa. 365 (1853).

The rule as to oysters growing naturally in public waters does not apply to oysters planted by an individual in a clearly marked bed in which they do not naturally exist. Such oysters are the subject of larceny. State v. Taylor, 27 N. J. L. 117 (1858); People v. Wanger, 43 Misc. 136 (N. Y. 1904); People v. Morrison, 124 App. Div. 10 (N. Y. 1908). Oysters, although usually classed as animals *ferae naturae,* which at common law were not the subject of larceny unless reclaimed from their wild state or reduced to actual possession, Regina v. Townley, 12 Cox C. C. 59 (Eng. 1871), differ from most wild animals in that they do not need to be tamed or confined, since they do not stray away; therefore the common-law principle has no application. State v. Taylor, *supra.*

EVIDENCE—DYING DECLARATIONS—The decedent was violently assaulted by her husband, and believing that she was about to die, made certain statements concerning the assault. She did not die until four or five days after the declarations were made. *Held:* The statements were admissible as dying declarations against the husband. State v. Lewis, 141 Pac. Rep. 1025 (Wash. 1914).

The authorities are ample in support of the proposition that dying declarations do not lose their character as such by the fact that the party making them did not die till after the lapse of considerable time. State v. Oliver, 2 Houst. 585 (Del. 1863); Boulden v. State, 102 Ala. 78 (1893). "The standard required for the admissibility of the dying declaration," says the court in the principal case, "is that the declarant should have believed that she was about to die, that she made the declaration under the belief that she would not recover, and that she did die of the illness from which she was suffering as the direct and proximate result of the original injury." *Accord:* Wilson v. Boerem, 15 Johns. 286 (N. Y. 1818); Sullivan v. Com., 93 Pa. 284 (1884); Com. v. Brewer, 164 Mass. 577 (1895).

The reason for the admissibility of dying declarations was thus expressed at the Old Bailey: "The mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath." King v. Drummond, Leach's Cases in Crown law (4th Ed.), page 337 (Eng. 1784). In recent years there have been two equally pronounced, but diametrically opposed, tendencies respecting the value of dying declarations. One view favors the extension of their admissibility to include civil cases, as well as criminal cases involving homicide. Thurston v. Fritz, 138 Pac. Rep. 625 (Kans. 1914); Wigmore's Evidence, Vol. II, §1436 (Ed. 1904). The other view is that dying declarations should be excluded in all cases. People v. Falletto, 96 N. E. Rep. 355 (N. Y. 1911); Chamberlayne's Modern Law of Evidence, Vol. IV, §2860 (Ed. 1913). In People v. Falletto, *supra,* the court said: "Dying declarations are dangerous because made with no fear of prosecution for perjury, and without the test of cross-examination, which is the best method known to bring out the full and exact truth."

JURORS—MISCONDUCT—UNAUTHORIZED VIEW—During a murder trial, two of the jurors visited the scene of the homicide, but did not communicate the fact to their fellow-jurors. *Held:* Such conduct is not of itself sufficient to warrant the granting of a new trial, but prejudice must be shown to have resulted. People v. Yee King, 141 Pac. Rep. 1047 (Cal. 1914).

This case is in accord with the general rule that any misconduct on the part of the jury which is prejudicial to the appellant will entitle him to a new trial. People v. Mitchell, 34 Pac. Rep. 698 (Cal. 1893); jurors treated by persons interested, McGill v. Air Line Ry., 19 L. R. A. 736 (S. C. 1906).

But bare misconduct, if the appellant is not prejudiced thereby, will not vitiate the verdict. Emporia v. Yuengling, 96 Pac. Rep. 850 (Kans. 1908); measuring distances in a criminal case, Hardin v. State, 49 S. W. Rep. 607 (Tex. 1899); reading biased newspaper when guilt of accused is clear, State v. Williams, 105 N. W. Rep. 265 (Minn. 1905); personally viewing a dog alleged to be vicious, Wooldridge v. White, 48 S. W. Rep. 1081 (Ky. 1899); examining vehicle used in a collision, Thoreson v. Quinn, 147 N. W. Rep. 716 (Minn. 1914); visiting scene of accident, Grunderson v. Minneapolis Ry., 148 N. W. Rep. 61 (Minn. 1914); viewing scene of alleged burglary, People v. Hope, 62 Cal. 29 (1882); noting speed of train which caused injury, Siemsen v. Oakland, 134 Cal. 494 (1901). Where the *locus* itself is in dispute, or where its exact condition has an essential bearing upon the controversy, an unauthorized view of the *locus in quo* by a juror is ground for setting aside the verdict, Siemsen v. Oakland, *supra;* but where there is no controversy as to the place inspected and no prejudice resulting from inspection, the verdict should not be disturbed, Bowman v. Furniture Co., 96 Ia. 188 (1895). In many jurisdictions the ruling is more stringent in criminal cases and especially in the case of felonies, where it is held that if the appellant has or might have been prejudiced, the verdict will be vitiated. Capps v. State of Arkansas, 159 S. W. Rep. 193 (Ark. 1913).

JURY—RIGHT TO TRIAL BY JURY—JUDGMENT N. O. V.—A Pennsylvania statute (P. L. 1905, p. 286, c. 198) provides that if a request by one party for binding instructions has been reserved or declined by the trial judge, and the jury has found for the other party, judgment *non obstante veredicto* may be entered by the court, if, upon examination of the whole record, it believes that the request should have been granted. In an action for negligence such judgment was entered and it was contended by the appellant that she had been deprived of her constitutional right of trial by jury. *Held:* The statute was not a contravention of the right of trial by jury and was therefore constitutional. Stryker v. Montoursville Borough, 57 Pa. Super. Ct. 100 (1914).

The constitutionality of this act was learnedly discussed in the United States Supreme Court in the case of Slocum v. New York Life Insurance Co., 228 U. S. 364 (1913). There it was held by a divided court of five to four that it was in violation of the Seventh Amendment of the Federal Constitution for the Circuit Court of Appeals to enter judgment *n. o. v.* against one party after the jury had found in his favor. But the Slocum Case guarantees the right of trial by jury in the Federal courts only. It in no way applies to proceedings in the State courts. Thus a Massachusetts statute (1909, c. 236), corresponding closely to the Pennsylvania Act, has been held not to deprive one of the constitutional right of trial by jury. Bothwell v. Boston Elevated Ry. Co., 215 Mass. 467, 62 U. OF P. L. R. 149 (1913). For a discussion of this subject, see 61 U. OF P. L. R. 673, 26 HARV. L. REV. 732.

NEGLIGENCE—DAMAGES—FRIGHT—The defendant's gas tank exploded and ripped up the floor on which the plaintiff was working. The plaintiff through fright fainted to the floor, although she was neither struck nor thrown by concussion. *Held:* The jury was justified in finding that the explosion caused the injuries. One who from fright, faints and falls, may recover for the physical injuries sustained thereby, though there can be no recovery for fright alone. Conley v. United Drug Co., 105 N. E. Rep. 975 (Mass. 1914).

The *dicta* in the principal case is in accord with the distinction drawn by Massachusetts in cases involving physical injuries resulting from fright. All jurisdictions agree that mere fright alone is not sufficient ground for damages. Ewing v. Pitts., Cinn., Chicago and St. Louis Ry., 147 Pa. 40, 14 L. R. A. 666 (1892); Huston v. Freemansburg Borough, 212 Pa. 548 (1905); Southern Pacific Co. v. Ammons, 26 S. W. Rep. 134 (Tex. 1894); Spade v. Lynn and Boston Ry., 168 Mass. 285 (1897); Kalen v. Terre Haute and

Indianapolis Ry., 47 N. E. Rep. 694 (Ind. 1897). But where the fright is accompanied by immediate physical injuries directly caused by the defendant's negligence, though the battery be almost negligible, it is equally well established that damages will lie for both. Warren v. Boston and Maine Ry., 40 N. E. Rep. 895 (Mass. 1895); Driscoll v. Gaffey, 207 Mass. 102 (1910); Hess v. Amer. Pipe Co., 221 Pa. 67 (1908); Lowe v. Metropolitan St. Ry. Co., 130 S. W. Rep. 119 (Mo. 1910).

Where the defendant's act causes fright, which in turn results in physical injuries, there is a conflict of opinion. The rule in New York, Pennsylvania, and in the majority of the eastern States is that, as fright cannot form the basis of an action, no recovery may be had for injuries resulting therefrom. This rule is based on grounds of public policy. Nelson v. Crawford, 122 Mich. 466 (1899); Mitchell v. Rochester Ry. Co., 151 N. Y. 107 (1896); Reed v. Ford, 112 S. W. Rep. 600 (Ky. 1908); Hack v. Dady, 118 N. Y. Sup. 906 (1909); Morris v. Lackawanna and Wyoming Valley Ry., 228 Pa. 198 (1910). The English rule, which prevails in the majority of the western and southern States, regards fright as a link in the chain of causation and allows an action for resulting physical injuries. Dulieu v. White & Sons, L. R. 2 K. B. 669 (Eng. 1901); Purcell v. St. Paul City Ry. Co., 48 Minn. 134 (1892); Yoakum v. Kroeger, 27 S. W. Rep. 953 (Tex. 1894); Simone v. Rhode Island Co., 28 R. I. 186 (1907); Pankopf v. Hinkley, 141 Wis. 146 (909); Green v. Shoemaker, 73 Atl. Rep. 688 (Md. 1909); Spearman v. McCrary, 58 So. Rep. 927 (Ala. 1912). Massachusetts draws a distinction between cases where the connection of the physical injuries with the fright is wholly internal, in which case no recovery is allowed. Spade v. Lynn and Boston Ry., 168 Mass. 285 (1897); White v. Sander, 168 Mass. 296 (1897); Smith v. Postal Tel. Co., 55 N. E. Rep. 380 (Mass. 1899) and where the fright induces reaction which results in external injury, in which case damages will lie. Cameron v. New Eng. Tel. Co., 182 Mass. 310 (1902); Nealand v. Lynn and Boston Ry., 173 Mass. 43 (1899).

NEGLIGENCE—RES IPSA LOQUITUR—As an ice dealer was carrying a piece of ice into a customer's kitchen, the ice fell from his tongs and injured the customer. *Held:* Negligence may be inferred from the happening of the accident. O'Neil v. Toomey, 105 N. E. Rep. 974 (Mass. 1914).

Before the well established doctrine of *Res Ipsa Loquitur* may be applied, it is necessary to show that the primary physical cause of the accident is within the control of the defendant. The mere fact of an accident is insufficient to impose a liability for negligence. Renders v. Grand Trunk Ry. Co., 108 N. W. Rep. 368 (Mich. 1906); Kohner v. Capital Traction Co., 22 App. 181 (D. C. 1903). Negligence can be inferred only in the case of an unexplained accident which, in the ordinary experience of mankind, would not have happened without fault on the part of the defendant. Breen v. New York Central & Hudson R. R. Co., 109 N. Y. 297 (1888); Richmond Railway & Electric Co. v. Hudgins, 100 Va. 409 (1902); McNamara v. Boston & Maine R. R. Co., 202 Mass. 491 (1909). The rule is based largely on the fact that because the management of the thing which caused the injury is in the defendant, it is within his power to produce evidence of the actual cause of the accident, while the plaintiff can only indicate the truth by circumstances which cast a suspicion of misconduct upon the defendant. Griffen v. Manice, 166 N. Y. 188 (1901). The inference of negligence is drawn from the nature of the act and the probabilities of accident and not from the relation of the parties. Consequently, the weight of authority is that the relation between the parties need not be contractual. Judson v. Giant Power Co., 107 Cal. 549 (1895); Cincinnati Traction Co. v. Holzenkamp, 74 Ohio St. 379 (1906). Pennsylvania, however, applies the doctrine only to cases where there is some contractual relation between the parties, Kepner v. Harrisburg Traction Co., 183 Pa. 24 (1897); and then only when there is an absolute duty or an obligation practically amounting to that of an insurer. East End Oil Co. v. Pennsylvania Torpedo Co., 190 Pa. 350 (1899).

NEGLIGENCE—UNREGISTERED AUTOMOBILE ON A HIGHWAY—An automobile, operated in violation of a statute forbidding the use of unregistered motor vehicles, was damaged in a collision with an electric car on a public highway. *Held:* Occupants of unregistered automobiles are trespassers on the highway, and have no rights against other travelers except to be protected from reckless or wanton injury. Dean v. Boston Elevated Ry. Co., 105 N. E. Rep. 616 (Mass. 1914).

This decision reaffirms the established Massachusetts rule. Dodley v. Northampton St. Ry. Co., 89 N. E. Rep. 25 (Mass. 1909); Chase v. New York Cent. R. Co., 94 N. E. Rep. 377 (Mass. 1911); Holden v. McGillicuddy, 102 N. E. Rep. 923 (Mass. 1913). In Dudley v. Northampton St. Ry. Co., *supra*, the court said, *inter alia*, "The legislature intended to outlaw unregistered automobiles, the owners of which furnished no means by which they could be identified and compelled to make proper compensation for the injuries which they might cause to other travelers." Passengers, though unaware that the car is not registered, are barred from recovery. Feeley v. City of Melrose, 205 Mass. 329 (1910). But an automobile operator, not licensed personally, as required by statute, may recover. Bourne v. Whitman, 209 Mass. 155 (1911). The distinction between non-licensed operators and unregistered automobiles has been recognized in two recent Pennsylvania cases. Bortner v. York Ry. Co., 22 Pa. Dist. Rep. 84 (1913), discussed in 61 U. OF P. L. R. 346; and Yeager v. Winton Motor Carriage Co., 53 Pa. Super. Ct. 202 (1913). The legislature of Connecticut has provided by statute that no recovery shall be had by the owner, operator, or passenger of an unregistered motor vehicle, "for any injury to person or property received by reason of the operation of said motor vehicle in or upon the public highways of the State." Public Acts of Connecticut, 1909, Chap. 211, Sec. 16.

The rule *contra* to the principal case is upheld in Atlantic Coast Line R. Co. v. Weir, 58 So. Rep. 641 (Fla. 1912); and the basis of the Massachusetts doctrine is discussed in 61 U. OF P. L. R. 346, and 62 U. OF P. L. R. 216.

NEGLIGENCE—VIOLATION OF ORDINANCE LIMITING SPEED—The breach of a municipal ordinance regulating the speed of vehicles, where such breach is the proximate cause of injury to a person, is negligence *per se*. O'Connor v. United Railroads, 141 Pac. 809 (Cal. 1914); Anderson v. Kinnear, 141 Pac. 1151 (Wash. 1914).

The weight, as evidence, to be attached to the fact of violation of a speed-regulating ordinance, in cases where that violation has led to the injury of an individual complainant, is a subject of great dispute. Kentucky does not admit such ordinance into evidence at all, in determining the question of negligence. Ford's Adm'r v. Paducah City Ry. Co., 124 Ky. 488 (1907). Kentucky stands alone, however, in that respect. In every other State in which the question has arisen, it has been held that the ordinance is admissible in evidence, the weight to be given thereto varying in the different States. Some courts merely say that the ordinance is competent evidence to be submitted to the jury, as tending to show negligence. Lind v. Beck, 37 Ill. App. 430 (1890); Wall v. Helena Street Ry. Co., 12 Mont. 44 (1892); Meek v. Penn. Co., 38 Ohio St. 632 (1883); Bracken v. R. R., 32 Pa. Super. Ct. 22 (1906); Southern Ry. Co. v. Stockdon, 106 Va. 693 (1907). A few cases declare that violation of speed-limiting ordinances is *prima facie* evidence of negligence. Colorado Ry. Co. v. Robbins, 30 Colo. 449 (1902); Oates v. Union Ry. Co., 27 R. I. 499 (1906); Riley v. Transit Co., 10 Utah, 428 (1894). Other courts, however, in accord with the principal case, hold that the breach of a speed-regulating ordinance, if such breach has contributed proximately to the injury complained of, is negligence *per se*. Robinson v. Simpson, 8 Houst. 398 (Del. 1889); Penna. Co. v. Horton, 132 Ind. 189 (1892); Kolb v. Transit Co., 102 Mo. App. 143 (1903); Moody v. Osgood, 60 Barb. 644 (N. Y. 1871); Memphis Street Ry. Co. v. Haynes, 112 Tenn. 712 (1904); Foley v. Northrup, 47 Tex. Civ. App. 277 (1907).

For a full treatment of the subject, see the article of W. P. Malburn, Esq., "The Violation of Laws Limiting Speed as Negligence," in 45 AM. LAW REV. 214. See also the recent cases in 62 U. OF P. L. R. 311, 572.

NUISANCE—HOSPITAL—INJUNCTION—A hospital was located on the property adjoining that of complainants. The moans, shrieks and groans of persons receiving surgical aid in the rooms of the hospital facing complainants' house were such as to render wretched the lives of complainants and of friends visiting them, and were such as to affect their nerves and impair their health. Also the market value of complainants' house was depreciated. *Held:* Where a hospital is conclusively shown to be a nuisance, its status as a charitable institution is no defense to an action to enjoin its maintenance. Kestner v. Hospital, 91 Atl. Rep. 659 (Pa. 1914).

In determining whether a certain use of property constitutes a nuisance the principal question is whether, in view of the obligation of the owner to others, the use of the premises in question is reasonable. Are the owners duly observing the legal precept *sic utere tuo ut alienum non laedas?* U. S. v. Luce, 141 Fed. Rep. 385 (1905). Hospitals are not *prima facie* or *per se* nuisances. City of Lorain v. Rolling, 24 Ohio C. C. 82 (1902); Manning v. Bruce, 186 Mass. 282 (1904); State v. Inhab's of Trenton, 63 Atl. Rep. 897 (N. J. 1906). But they may be so located and conducted as to be nuisances to people living close to them. Met. Asylum Dist. v. Hill, 6 App. Cas. 193 (Eng. 1881); Gilford v. Babies' Hospital, 1 N. Y. Supp. 448 (1888); Deaconess Home, *etc.*, v. Bontjes, 207 Ill. 553 (1904).

PLEADING—AMENDMENT—DISCRETION—The plaintiff, in a cause remanded for a new trial, sought upon three separate occasions to amend his complaint so as to change his cause of action. Two of the three applications to amend were made after the statute of limitations had run. *Held:* The refusal of the court to allow such amendments was not an abuse of the discretion of the court. Elder v. Idaho-Washington Northern R. R., 141 Pac. Rep. 982 (Idaho, 1914).

After a new trial has been granted, the power of amendment is the same as it was before the first trial, and it is in the discretion of the court to allow or refuse all proposed amendments; Vawter v. Brown, 20 Ind. 277 (1863); Central Savings Bank v. O'Connor, 139 Mich. 82 (1905); and the result in either case is not assignable for error, unless there has been an abuse of discretion. Forrestell v. Wood, 23 Atl. Rep. 133 (Md. 1891). The general rule is that amendments which propose a change in the original cause of action will not be allowed either before the statute of limitations has run; Pitkins v. N. Y., *etc.*, R. R., 64 Conn. 482 (1894); Silver v. Jordan, 139 Mass. 280 (1885); but see *contra*, Cahn v. Tootle, 58 Kans. 260 (1897); Thileman v. New York, 71 App. Div. 595 (N. Y. 1902); or after the statute has run: Union Pacific R. R. v. Wyler, 158 U. S. 285 (1894); Lane v. Water Co., 220 Pa. 599 (1908); but see *contra*, Philadelphia, *etc.*, R. Co. v. Galta, 85 Atl. Rep. 721 (Del. 1913). Amendments which introduce a new cause of action will be allowed before the statute has run; Oliver v. Raymond, 108 Fed. Rep. 927 (1901); but not after the statute has run. Chicago, *etc.*, R. Co. v. Scanlan, 170 Ill. 106 (1897).

Amendments which propose to change the original form of action will be allowed in most States, provided the action is not changed from one *ex contractu* to one *ex delicto* and *vice versa*. Gates v. Paul, 117 Wis. 170 (1903); Doyle v. Pelton, 134 Mich. 398 (1903); Slater v. Fehlberg, 24 R. I. 574 (1903), *contra*. A few jurisdictions, however, allow the form of action to be changed from tort to contract and *vice versa*. Smith v. Bellows, 77 Pa. 441 (1875). Amendments which do not change the cause or form of the action are allowed, regardless of the running of the statute. Hertel v. Boismenue, 82 N. E. Rep. 298 (Ill. 1907); Schmelzer v. Chester Traction Co., 218 Pa. 29 (1907). The tendency seems to be to allow all amendments which will not prejudice the interests of the other party.

PROPERTY—MINE ORE—PERSONALTY OR REALTY—The owner of a copper mine placed on a dump nearby some two thousand tons of ore which were of such quality that his methods of reductions did not render them profitable to work. When the mine latter passed out of his possession, he sought to recover damages for the conversion of the ore, claiming that it was personalty and still belonged to him. *Held:* The intention with which the ore was extracted and placed on the dump controls in determining its *situs*. Steinfeld v. Copper Company, 141 Pac. Rep. 847 (Ariz. 1914).

The general rule is that minerals lying beneath the surface or on the surface unworked are realty. Stoughton's Appeal, 88 Pa. 198 (1878); Blakley v. Marshall, 174 Pa. 425 (1896); Wilson v. Hughes, 43 W. Va. 826 (1897); Oil Company v. Colquitt, 28 Tex. Civ. App. 292 (1902). But when severed from the soil they become personal property. Hail v. Reed, 15 B. Mon. 479 (Ky. 1854); Lykens Valley Coal Co. v. Dock, 62 Pa. 232 (1869). As illustrated by the principal case, the kind of substance which will pass under a lease will depend on the intent of the parties as evidenced by the provisions and stipulations of the lease or conveyance. Doster v. Zinc Co., 140 Pa. 147 (1891); Lance v. Coal Co., 163 Pa. 84 (1894).

TORTS—IMPUTED NEGLIGENCE—While the plaintiff was riding in an automobile at the invitation of the owner, the machine was struck by one of defendant's cars negligently operated and he was injured. The defendant claimed that the contributory negligence of the driver of the automobile could be imputed to the plaintiff. *Held:* As the plaintiff was in the car as an invitee, the driver was in no manner his servant, and the negligence of the latter could not be imputed to him. Tonseth v. Portland Ry., 141 Pacif. Rep. 868 (Ore. 1914).

The doctrine of imputed negligence had its rise in Thorogood v. Bryan, 8 C. B. 115 (1849). This case has been overruled in England, The Bernina, 12 P. D. 58 (1887); Mills v. Armstrong, 13 App. Cas. 1 (1888), but has been followed in Wisconsin, Lightfoot v. Winnebago, 123 Wis. 479 (1905), and in Michigan, though there it does not apply to adults. Hampel v. Detroit R. R., 138 Mich. 1 (1904), nor to a passenger of one common carrier injured by the concurring negligence of it and another carrier. Cuddy v. Horn, 46 Mich. 596, 602 (1881). The rule has been adopted without limitation in Vermont. Carlisle v. Sheldon, 38 Vt. 440 (1866), and in Montana, Whittaker v. Helena, 14 Mont. 124 (1894).

The unbroken line of authority in all other States is opposed to this doctrine of Imputed Negligence. With some modifications in its application to particular cases, the general rule is that where the injured person and the driver do not occupy the position of master and servant, parent and child, principal and agent, and where the plaintiff is himself in the exercise of due care, having no reason to suspect carelessness or incompetency on the part of the driver and is injured by the concurring negligence of the driver of the vehicle and some third person, the guest is not precluded from recovery against the third person by reason of the negligence of the driver. Shultz v. Old Colony St. Ry., 193 Mass. 309, 315 (1907). To the same effect are the following: Elyton Land Co. v. Mingea, 89 Ala. 521 (1889); Colorado v. Southern Ry. v. Thomas, 33 Col. 517 (1904); Hot Springs St. R. R. v. Hildreth, 72 Ark. 572 (1904); Christy v. Elliot, 216 Ill. 31 (1905); West Chicago St. R. R. v. Dougherty, 209 Ill. 241 (1904); Nesbit v. Garner, 75 Iowa, 314 (1888); Leavenworth v. Hatch, 57 Kan. 57 (1896); Cahill v. Cincinnati Ry., 92 Ky. 345 (1891); Neal v. Rendall, 98 Me. 69 (1903); Cunningham v. Thief River Falls, 84 Minn. 21 (1901); Holden v. Missouri R. R., 177 Mo. 456 (1903); Baltimore & Ohio R. R. v. State, 79 Md. 335 (1894); Noyes v. Boscawen, 64 N. H. 361 (1887); Bresee v. Los Angeles Traction Co., 85 Pacif. 152 (Cal. 1906); Mack v. Shawangunk, 90 N. Y. Supp. 760 (1902); Ala. & Vicksburg Ry., 69 Miss. 444 (1876); Noonan v. Consolidated Traction Co., 35 Vroom, 579 (N. J. 1899); Duval v. Atlantic Coast Line, 134 N. Ca. 331 (1904); Transfer Co. v. Kelly, 36 Ohio St. 86 (1887); Metro-

politan Ry. v. Powell, 89 Ga. 601 (1892); Overson v. Grafton, 5 N. Dak. 281 (1895); Hydes Ferry Co. v. Yates, 67 S. W. 69 (Tenn. 1902); Farley v. Wilmington Ry., 52 Atl. 543 (Del. 1902); M. K. & T. Ky. v. Rogers, 91 Tex. 52 (1897); Atlantic & Danville R. R. v. Ironmonger, 95 Va. 625 (1898); Shearer v. Buckley, 31 Wash. 370 (1903); Hajsek v. Chicago, Burlington & Quincy R. R., 68 Neb. 539 (1903); Little v. Hackett, 116 U. S. 366 (1885).

TRUSTS—PRECATORY WORDS—ABSOLUTE GIFT—A testator gave the residue of his estate "to my wife for and during her natural life, with full power to sell or dispose of my real estate, securities of any and all kinds, in such a manner as she may desire, with the request, however, that care be taken in investing any money that is not required for living expenses, with the wish that she may not feel it is necessary to be unduly economical" and made no gift over of the estate. *Held:* The request was merely precatory; the provision giving the wife power of disposal of the estate disclosed testator's intention to vest in the wife an absolute estate and not merely a life estate. Rogers Estate, 245 Pa. 206 (1914).

At the common law, in cases where trusts were sought to be created under precatory words, if the subject (property) and the object (beneficiary) were certain it was *prima facie* evidence that a power in trust was created, and the burden lay on the one claiming otherwise. Harland v. Trigg, 1 Brown Ch. Cases, 1421 (Eng. 1782); Malim v. Keighly, 2 Vesey Jr. (Eng. 1794); Wynne v. Hawkins, 1 Brown's Ch. Cases, 179 (Eng. 1782).

Today this is not the test, for, though uncertainty of object or subject is evidence that nothing binding was intended, yet if they are certain it is not evidence that it was intended to be binding, and the test is, that the words be given their ordinary meaning in conjunction with the intent expressed by the whole will. This applies, of course, only to precatory words, for no matter how uncertain the object is when mandatory words are used, it will be held to be a power in trust, even though it be so uncertain as to result in favor of the heirs of the testator. *In re* Diggles, 39 Ch. Div. 253 (Eng. 1888); Lambe v. Eames, 6 Ch. Ap. 597 (1871); Nichols v. Allen, 130 Mass. 211 (1881); Schmucker v. Reel, 61 Mo. 592 (1895); *In Re* Ingersoll, 31 N. E. Rep. 47 (N. Y. 1892). For other cases see Ames' Cases on Trusts, notes pp. 87-91. Under these tests clearly there was no trust established in the principal case.

In addition there is the general rule that a gift for life without a gift over passes the whole estate; this is not a rule of law, but one of construction in aid of discovery of the testator's intention. Tyson's Estate, 191 Pa. 218 (1899); Brownfield's Estate, 8 Watts, 465 (Pa. 1839); Diehl's Appeal, 36 Pa. 120 (1880); Shower's Estate, 211 Pa. 297 (1905). Thus in Merkel's Appeal, 109 Pa. 235 (1885), where a testator gave to his wife "my remaining personal property to her full ownership as long as she doth live, recommending that my executor shall see after that her money does not become lost," the court decided that the will vested the estate absolutely in the widow as the recommendation was merely precatory and not sufficient to convert the bequest into a trust. The decision arrived at in the principal case seems therefore correct.

WATERS—SURFACE WATER—A railroad company built a culvert beneath its tracks to carry surface water through to the plaintiff's land on the lower side. *Held:* An injunction will not be granted unless injury will result to the plaintiffs. Gulf, *etc.*, Ry. Co. v. Richardson, 141 Pac. Rep. 1107 (Okla. 1914).

The cases are in conflict as to the right to divert surface water accordingly as they follow the rules of the common or of the civil law. The former regarded surface water as a "common enemy," and every proprietor was allowed to get rid of it as best he could, either by sending it back or by passing it on to the lower proprietor, Reeves on Real Property, Vol. I, p. 301; Broadbent v. Ramsbotham, 11 Ex. 602 (Eng. 1856); Thoele v. Marvin Mill Co., 148 S. W. Rep. 413 (Mo. 1912); Healy v. Everett Traction Co., 139

Pac. Rep. 609 (Wash. 1914). This was early qualified by the requirement that one proprietor could not protect himself in such a way, as to cause harm to his neighbor, as by collecting the water and pouring it down in a flood. This is the rule in England and in the majority of American jurisdictions and is the one followed in the principal case. Broadbent v. Ramsbotham, *supra;* Louisville and N. Ry. v. Wilson, 14 Ky. L. 719 (1893); Bunderson v. Burlington and M. Ry. Co., 61 N. W. Rep. 721, 43 Neb. 545 (1895); New York, P. and N. Ry. v. Jones, 50 Atl. Rep. 423, 94 Md. 24 (1901); Frisbie v. Cowen, 18 App. D. C. 381 (1901); Ladd v. Redle, 75 Pac. Rep. 691 (Wy. 1904); Dorr v. Simmerson, 103 N. W. Rep. 806 (Iowa, 1905); Pitts., Chicago, Cinn. and St. Louis Ry. v. Atkinson, 97 N. E. Rep. 353 (Ind. 1912); Lyons v. Fairmont Real Estate Co., 77 S. E. Rep. 505 (W. Va. 1913); Slater v. Price, 80 S. E. 372 (S. C. 1914); Grimes v. St. Louis Ry., 168 S. W. Rep. 317 (Mo. 1914).

The civil law compelled the lower of two adjacent estates to receive the drainage according to the natural contour of the land. Under this view the upper proprietor must let the water pass off naturally and *a fortiori* has no right to converge it into a stream to the detriment of his neighbor. A few American jurisdictions have adopted this doctrine. Livingston v. McDonald, 21 Iowa, 160 (1866); La. Code, Art. 656; Foley v. Gadchaux, 48 La. Ann. 466 (1896); Ill. Cent. Ry. v. Miller, 68 Miss. 760 (1891); Wood v. Moulton, 146 Cal. 317 (1905); Town of Bois D'Arc v. Convery, 99 N. E. Rep. 666 (Ill. 1912); Louisville and N. Ry. v. Maxwell, 148 S. W. Rep. 692 (Tenn. 1912). Pennsylvania and Alabama have adopted a "reasonable compromise" and follow the common law rule in the municipalities and the civil law rule in rural estates. This is based on economic principles. White v. Phila. and Reading Ry., 46 Pa. Sup. Ct. 372 (1911); Wilson v. McCluskey, 46 Pa. Sup. Ct. 594 (1911); Miller v. Laubach, 47 Pa. 154 (1864); Rhoads v. Davidheiser, 133 Pa. 226 (1890); Hall v. Rising, 37 So. Rep. 586, 141 Ala. 431 (1904); Shahan v. Brown, 60 So. Rep. 891, 43 L. R. A. (N. S.) 792 (Ala. 1913). Minnesota and Wisconsin put the entire question upon a "reasonable basis." Howard v. Ill. Cent. Ry., 133 N. W. Rep. 557 (Minn. 1911); Rieck v. Schamanski, 134 N. W. Rep. 228 (Minn. 1912); Adlington v. City of Viroqua, 144 N. W. Rep. 1130 (Wis. 1914). Arkansas and South Carolina follow neither doctrine, but look to the "circumstances of each case." Little Rock Ry. v. Chapman, 39 Ark. 463 (1882); Waldrop v. Greenwood Ry., 28 S. C. 157, 23 Am. L. R. 387 (1887).

For an excellent summary of the law on this subject, see opinion of Cooper, J., in Ill. Cent. Ry. v. Miller, *supra,* and Gould on Waters, §§265, 266.

WILLS—RULE ON SHELLEY'S CASE—A testator devised his house to "my daughter for life, and upon her death to the children of my said daughter share and share alike, *etc.*" *Held:* The rule in Shelley's Case did not apply and that the daughter only took a life estate. Stout v. Good, 245 Pa. 383 (1914).

A testator devised realty to "my son for life, and upon his decease to his descendants who shall then be living, *etc.*" *Held:* The rule did not apply and the son obtained only a life estate. Lee v. Sanson, 245 Pa. 392 (1914).

A testator's will read, "After the death of my wife, I devise to A and B the use and income of all my estate, share and share alike, for their lives. In case of the decease of one, the other shall have a life interest in one-half of my estate and the remainder shall be appropriated as hereinafter provided. After the death of A and B, I devise the undivided one-half part of all my estate to the heirs of A and the other one-half part to the heirs of B, to have and to hold forever." *Held:* Under the rule in Shelley's Case, B took a fee simple title in the undivided one-half interest in the real estate. Harrison v. Harris, 245 Pa. 397 (1914).

The Pennsylvania attitude is that the rule in Shelley's Case is not a rule of construction but of law and is never applied until the meaning of the testator is first ascertained. If the words show that the testator intended

the remainderman to take directly from him and not by inheritance from the devisee of the life estate, then the rule has no application. On the other hand, if they show a contrary intention, the rule applies. Kemp v. Reinhard, 228 Pa. 143 (1910); Lauer v. Hoffman, 241 Pa. 315 (1913); Guthries' Appeal, 37 Pa. 9 (1861). In accord with the first case, the authorities agree that "children" is *prima facie* a word of purchase, and that it cannot be construed otherwise unless the context plainly shows that the testator did not employ the word in its ordinary sense. Affolter v. May, 115 Pa. 54 (1887); Halderman v. Halderman, 40 Pa. 29 (1861); Pifer v. Locke, 205 Pa. 616 (1903), and therefore the rule should not apply. It requires the same degree of conclusive evidence to enlarge "children" to a word of limitation as it does to restrict "heirs" or "heirs of the body" to words of purchase. Guthries' Appeal, *supra*.

"Issue" is *prima facie* a word of limitation, but it readily yields to a context that indicates its use as a word of purchase. Beckly v. Reigert, 212 Pa. 91 (1905); Parkhurst v. Hanower, 142 Pa. 432 (1891); Robins v. Quinlivien, 79 Pa. 333 (1875). The word "descendants" is at most only the equivalent of "issue." Waln's Estate, 189 Pa. 631, 632-3 (1898), but when qualified by the phrase "may be then living" it is clearly a word of purchase. Taylor v. Taylor, 63 Pa. 481 (1869); Jones v. Jones, 201 Pa. 548 (1901); though such a phrase is not sufficient to reduce such technical terms as "heirs" or "heirs of the body" to words of purchase. Cresswell's Appeal, 14 Pa. 288 (1861); Cockins' Appeal, 111 Pa. 26 (1885); Heister v. Yerger, 166 Pa. 445 (1895), unless such is clear by other parts of the will. McCann v. McCann, 197 Pa. 452 (1900); Hill v. Giles, 201 Pa. 215 (1901).

When "heirs" is employed in connection with remaindermen, the rule in Shelley's Case applies, unless other language in the will clearly demonstrates that the word was not intended in its technical sense, as a term of limitation, so clear as to leave no reasonable doubt. Little's Appeal, 117 Pa. 14 (1887); Grimes v. Shirk, 169 Pa. 74 (1895); Kemp v. Rheinhard, 228 Pa. 143 (1911); Shapley v. Diehl, 203 Pa. 566 (1902); O'Rourke v. Sherwin, 156 Pa. 285 (1893), and the round about way which the testator takes to say "heirs" in the third principle case does not affect the substance. McKee v. McKinley, 33 Pa. 92 (1859). It seems, therefore, that the decisions in the principal cases are correct.